SUPREME COURT, U. S.

DEC 24 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-795

MARIO CURBELO-TALVARA,
and OCTAVIO PINO-VILLA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, Mario Curbelo-Talvara and Octavio Pino-Villa, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 18, 1974, affirming the judgment of conviction previously entered in the United States District Court for the Middle District of Florida at Ocala. Petition for Rehearing was denied November 22, 1974.

OPINION BELOW

The Opinion and Judgment of the Fifth Circuit are reported at 497 F.2d 165 (1974). It is reproduced as an Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on July 18, 1974. Petition for Rehearing was denied on November 22, 1974. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether law enforcement officials obtaining evidence from an accused's own mouth after arrest, indictment, and arraignment through surreptitious inquiry of a government informant, absent the accused's attorney and absent his knowledge of such government inquiry, is violative of the accused's Fifth Amendment guarantee against self-incrimination and his Sixth Amendment right to counsel.

II.

Whether the presentation of post-arrest, post-indictment, and post-arraignment hearsay testimony concerning an alleged plot to murder the government informer deprives the petitioners of due process of law and their right to confront the witnesses against them.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . . nor shall be compelled in any case to be a witness against himself . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

STATEMENT OF THE CASE

The Petitioners Octavio Pino-Villa, and Mario Curbelo-Talvara, will be sometimes referred to as Pino, and Curbelo in this brief. The reason for this difference in referral is that the appellants are so named throughout the testimony.

The designation of record will be as follows: (Tr) will be general record, (r) will be partial transcript of testimony of Juan Ortiz filed April 24, 1973, (rr) will be partial transcript of testimony of Juan Ortiz filed April 30, 1973.

The Government's Case-in-Chief

The chief government witness was one Juan Ortiz, a paid government informer (Tr 261-262) and a convicted narcotics violator whose continued freedom on probation was contingent upon continued cooperation with government narcotic agents. (Tr 751)

Ortiz went to the McAllister Hotel in Miami, Florida to meet one Raul Gonzales concerning a narcotics case.

At this meeting which occurred sometime in the month of December prior to Christmas, Gonzales was checked into Room 94. Ortiz met a man named Narces Dace from Barranquilla, Columbia who inquired into Ortiz's expertise as a pilot. (r 13-14) Dace then made inquiry as to whether Ortiz and he could do business together and Dace further indicated that he would contact Ortiz upon his return from a trip to New York City. (r 15-16)

There followed a second meeting at the McAllister Hotel some eight to ten days prior to Christmas at which Dace informed Ortiz that he had gone to New York City and Barranquilla, Columbia and returned to Miami. (r 17) At this meeting Dace informed Ortiz that he desired to meet Mr. Curbelo. Ortiz set a meeting up which took place in a trailer located at 106th Avenue and 4th Street Southwest in Miami. (r 6-7) At this meeting Dace informed Curbelo that a friend of Curbelo had a problem in that this friend's wife was imprisoned in Columbia. Dace further explained that this friend desired Curbello's assistance in securing necessary monies to aid the incarcerated spouse. In order to secure these funds, Mr. Curbelo was to purchase some marijuana from Dace's contacts in Columbia and bring it into the United States. (r 8-9)

Mr. Curbelo gave Ortiz an initial $200 for expenses which Ortiz used to rent a twin engine Beechcraft airplane. Mr. Curbelo gave Ortiz an additional $2,500 for expenses. The plan agreed upon was for Ortiz to fly into Leesburg, Florida after picking up the marijuana in Columbia and pick up a car which was to be waiting with a key in the ignition. Ortiz was then to meet Curbelo and another individual named Pino at the Holiday Inn Motel in Leesburg. (rr 6-7)

Ortiz left from Miami, Florida on January 2, 1973 and flew to Kingston, Jamaica where he stayed overnight. He then flew to Cartagena, Columbia the next morning. (rr 8-9)

Ortiz met Dace in Cartagena, Columbia and flew from there to a secreted farm in Columbia where he got the load of marijuana. Ortiz then proceeded to Marathon, Florida, refueled and journied on to Leesburg, Florida where the 1,800 pounds of marijuana, disguised as 24 cartons of cigarettes, was unloaded by Ortiz and customs agents and placed on the runway. The car Ortiz was expecting was not present so he traveled by plane on to Miami. (rr 13-14)

During his journey Ortiz always had United States Customs Agents present. (rr 154) Agent Stewart followed Ortiz in a customs aircraft and talked to him on the ground at Kingston, Jamaica and Leesburg, Florida. Ortiz landed illegally at Marathon, Florida with the consent of the customs service. Four customs agents were waiting for Ortiz to land in Marathon, Florida. (rr 176-180) None of the defendants were present when Ortiz landed and no car was waiting for him at the airport. Therefore, Ortiz called the Holiday Inn to make inquiry as to why there was no car waiting for him, and he was unable to reach any of the defendants. (rr 181-185)

The $36,000 determined as an initial fee in the original meeting between Mr. Curbelo and Dace had not been paid upon Ortiz's arrival in Columbia and to Ortiz's knowledge was never paid by Curbelo. Of the $2,900 given to Ortiz by Curbelo as expense money, Ortiz spent only $900 and kept the rest. (rr 163-164)

On January 9, 1973, surveillance was maintained by Customs Agents at the Leesburg Airport. (Tr 281) At

approximately 9:30 p.m. Ortiz landed his plane and Customs Agent Robert Gonsalves assisted Ortiz in unloading the plane of the 24 cigarette cartons. Agent Gonsalves remained with the cartons after Ortiz had departed and maintained a surveillance of the runway where the cartons were located. (Tr 321-323) At approximately 4:30 a.m. January 10, 1973, four vehicles pulled up and parked near the runway, extinguished their lights and appeared to wait. At approximately 5:00 a.m. the same day two of the vehicles proceeded to the area of the cardboard cartons. (Tr 323-324) A third vehicle then followed those two to the area of the cartons and after these vehicles left, the cartons on the runway were gone. (Tr 326-328)

Earlier the four vehicles had been observed in the area of the Holiday Inn parking lot. At this time Mr. Curbelo and Mr. Pino were observed leaving the Holiday Inn in a Toronado; they then entered a Burger stand next to the Holiday Inn and stayed for a few moments. Mr. Curbelo and Mr. Pino then drove to the parking lot of the Holiday Inn and joined three vehicles already there. (Tr 394-400) The testimony is rather confusing as a multitude of agents testified as to mysterious comings and goings of four different vehicles: namely, a Toronado, a Chevrolet Super Sport, an Olds Cutlass and a brown Chevrolet.

These cars at 5:00 a.m. on January 10, 1973 left the airport and were stopped by United States Customs Agents. Mr. Curbelo's car was parked in a Shell Service Station across from the airport. As the other three vehicles exited the airport Mr. Curbelo pulled out of the Shell Station and joined the other cars. Mr. Curbelo was alone in the Toronado and there were no cartons in Mr. Curbelo's vehicle. (Tr 399-400) Mr. Pino was stopped in a maroon colored Chevrolet in which was discovered nine of the cartons. (Tr. 400)

REASONS FOR GRANTING WRIT

The Petitioner Octavio Pino-Villa Was Deprived of His Fifth Amendment Right Not to Testify Against Himself and His Sixth Amendment Right to Be Represented by Counsel

The simple and persuasive facts supportive of this contention are as follows:

1. The petitioner was arrested on January 10, 1973;
2. Indictment by the grand jury occurred on January 17, 1973;
3. The petitioner was arraigned on February 14, 1973, and entered a plea of not guilty to the charge.

At trial, the government made a proffer of the testimony of the informer Ortiz of a conversation which occurred on February 20, 1973 with the petitioner Pino-Villa. The substance of that proffer was as follows:

> Q. What was the substance of your conversation, if any, at that time?
>
> A. The same as the conversation went around again on what happened on Leesburg on January the 9th, 1973 and the general conversation went around what happened and Mr. Pino observed to make a remark that they feeling that somebody has been informing to the Government of what was taking place and that's the way they got cut out and if they discovered the person who has been informing to the Government, they would eliminate this person.
>
> MR. YERKES:
> Thank you.
> That's the substance of the testimony.
> Q. O.K. Who was present at that time?

A. Mr. Pino.

Q. Anybody else? (rr 44-45)

The trial court then offered defense counsel an opportunity to make objections to the proffer and a colloquy between the trial court and counsel occurred as follows:

THE COURT:

All right, I'll hear any objections you gentlemen have.

MR. BERGSTRESSER:

Now, Your Honor please, I object that first of all, as to remoteness. This is February 20th, some weeks after the—

MR. YERKES:

Approximately a month after the conspiracy ended.

MR. BERGSTRESSER:

—conspiracy and secondly as to the probative value itself. He has already testified substantially to that from another conversation he had with the witness—with some witness, I don't know which one.

MR. YERKES:

Mr. Quinones, the other—another one of the defendants.

MR. BERGSTRESSER:

Mr. Quinones. I think it lacks probative value too, Your Honor.

THE COURT:

Mr. Weires, anything you have to say?

MR. WEIRES:

Yes, Your Honor, this has no value in this case as such. It's merely to prejudice the jury against these defendants. There is no probative—it has noth-

ing to do with the actual importation or possession or conspiracy to import marijuana into the United States. This is something entirely separate.

THE COURT:

Objections overruled. The testimony is admissible in the opinion of the Court.

Bring in the jury.

MR. BERGSTRESSER:

One further objection. I feel that since this is outside the conspiracy, that it would be hearsay as to my defendant, Your Honor.

THE COURT:

Well—

MR. BERGSTRESSER:

He was not present.

THE COURT:

I realize that. Objection overruled.

MR. YERKES:

Your Honor—

Mr. Weires?

MR. WEIRES:

Yes, Your Honor, I would like to put the other defendants also.

THE COURT: (rr 45-47)

The testimony of Mr. Ortiz was then offered at trial as follows:

Q. O.K., thank you. I draw your attention to on or about the 20th of February, 1972, and ask you at that time

THE COURT:

February 20, 1972?

MR. YERKES:

'73, excuse me, Your Honor.

BY MR. YERKES:

—and ask you whether or not you had a conversation with Mr. Pino at that time?

A. Yes, I did, sir.

Q. Can you tell me where that was?

A. Yes, it was in Miami, Florida in Dade County, around 4:00 p.m. in the afternoon on the Westchester area in a gas station.

Q. Who was present at that time?

A. Mr. Pino and myself.

Q. You were the only two present?

A. Yes, sir.

Q. What, if any, conversation did you two have at that time?

A. Well, we discussed the—

MR. BERGSTRESSER:

Your Honor please, again for the record and I don't wish to interrupt, I feel that this would be hearsay to my client because he of course was not present and this is beyond the dates in question.

THE COURT:

Objection overruled.

BY MR. YERKES:

Q. I would ask you the question again. What was the substance, if any, of any conversation you had at that time?

A. We discussed all that were happening about this flight I made from Colombia to Leesburg and Mr. Pino mentioned that they feel there is some of the person involved in this smuggling case—

THE REPORTER:

In this what?

THE WITNESS:

—in this case, this smuggling case is being informant to the Government and if they find out the person, they would just take an action against this person.

Q. (By Mr. Yerkes) Did they say what type of action they would take against the person?

A. I assumed the—

Q. You can't assume.

A. Well, not so much. I know that they mentioned they will take an action against the—the life of the—

MR. BERGSTRESSER:

Your Honor please, I think there is an objection before the Court.

Wait just a minute. You can say what was actually said and let the jury draw any proper conclusions—

THE WITNESS:

If you want to hear the exact words "We'll kill him."

THE COURT:

Wait just a minute.

MR. BERGSTRESSER:

I move that that comment be stricken and the witness admonished.

THE COURT:

The last comment, if you heard it, of the witness will be stricken and disregard it in arriving at your verdict. Ladies and Gentlemen of the Jury.

Now, let's see where we stand. We have no question. Do we have a question presently pending to this witness? What he can say—

MR. YERKES:

I'll rephrase the question, yes, Your Honor.

THE COURT:

In answering your question as rephrased if it's not objectionable, and the Court allows it to be asked, he can state what this—what a particular defendant said to him and it's up to the Jury to draw whatever inference and conclusion if proper from that testimony rather than this witness cannot give opinions and conclusions of his own because he's not an expert witness.

BY MR. YERKES:

Q. Would you please tell us, Mr. Ortiz, what, if anything, Mr. Pino told you at that time concerning what you were just telling us.

A. O.K., the conversation was in Spanish and we have many slang—

Q. Slang?

A. Slang for the word of killing and he used one of those slangs to say that if they find out who the person or the informer was being talking with the Government, they would get rid of this person. (rr 47-52)

Given these facts it is obvious that the factual situation falls within the holding of *Massiah* v. *U. S.*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In *Massiah*, the defendant, after being indicted with other persons for violating the federal narcotic laws, retained a lawyer, pleaded not guilty and was released on bail. While free on bail, the defendant held a conversation in the absence

of his counsel with one of his codefendants while sitting in the latter's automobile, unaware that the codefendant, cooperating with government agents, had allowed the installation of a radio transmitter under the front seat of the automobile, by means of which a federal agent listened to the conversation. Evidence of this conversation was introduced against the defendant at his trial.

Citing *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 265 (1959), as precedent and referring to the New York rule as formulated in *People* v. *Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, which provides that counsel must be present at any questioning after an indictment, the Court observes that "This view no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55.

The holding of the Court was "That the petitioner was denied the basic protections of the Sixth Amendment when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals:

> "[I]f such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon * * * because he did not know that under interrogation by a government agent."

It is certainly true that during the critical period of the proceedings, from the time defendant is charged until his trial, he is as much entitled to the aid of counsel as at the trial itself. *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Clifton* v. *U. S.*, 341 F.2d 649 (1965).

In *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the fundamental constitutional right under the Sixth Amendment to the assistance of counsel in the defense of all criminal courts has been scrupulously maintained. That assistance was not available to the defendants Quinones and Pino.

In addition, the landmark decision of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established that:

> "* * * [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

These procedural safeguards were then defined as the "Miranda" warnings now so well known to every person connected with or knowledgeable about the criminal justice system. These required warnings were certainly absent in the instant case. As was said in 49 Minn. L. Rev. 49 at 57 (Enke and Elses, Counsel for the Suspect):

> "The real issue presented in *Massiah* is whether law-enforcement officials may seek evidence from an accused's own mouth when the accused does not realize that he is talking to such officials and is providing them with evidence that will help to convict him."

The conceptual framework of criminal justice in America is the adversary process between the prosecution and the defense. This delicate balance is supposedly weighed toward the defendant by the concept of presumption of innocence. However, that balance is continually threatened by a broad disparity of resource between the government and the defendant.

Should the government then be allowed to encourage paid secret informers to engage the defendant in conversation after his indictment and seek to convict him with his own words *sans* the procedural safeguards delineated in *Miranda*? Obviously, this would open avenues of intrigue to already over-zealous narcotics officers and would create a situation abhorrent to the ideal of Justice.

The petitioner Pino has been deprived of the Constitutional guarantees mandated by the Fifth and Sixth Amendments to the United States Constitution and the result is that the judgment of conviction against him should be reversed.

The Sixth Amendment's Guarantee of the Right of the Petitioners to Confront the Witnesses Against Them Was Denied by the Erroneous Admission of Prejudicial Hearsay Testimony

The testimony of the informer Ortiz was then utilized once again to completely obviate the right of the defendants of a fair trial. This particular episode consisted of another post-arrest, post-indictment, post-arraignment conversation. This conversation was between a co-defendant Quinones-Pita and Ortiz. The nature of this conversation was an irrelevant presentation of hearsay and could not be justified by any of the myriad of exceptions to the rule prohibiting such hearsay.

Ortiz on direct examination testifying to a conversation that took place in the middle of February, 1973 stated:

Q. O.K., what was that conversation?

A. Well, the conversation went generally around what happened between the time I went down to Colombia and the time I came back to Leesburg and following that part, more or less it went around they feel it was somebody—

THE REPORTER:

The feeling that some—

THE WITNESS:

They have a feeling there was somebody—

MR. BERGSTRESSER:

Your Honor, again I don't want to interrupt but I can't really understand. He said a general conversation concerning "they" and so forth and I think he could be more specific as to what he said to him and what he said to him.

THE COURT:

Well, you can make it more specific if you care to on cross-examination.

MR. BERGSTRESSER:

Fine.

THE COURT:

On the other hand, you have got to, in order to make the testimony admissible, Mr. Yerkes, identify who he was talking to and who said what and to whom if it involves any of these defendants.

BY MR. YERKES:

Q. I believe you said you were talking to Mr. Quinones, is that correct?

A. Yes, I did.

Q. And you said "they," "they thought somebody" was doing what?

A. They say somebody was—

THE COURT:

Well, not by "they," who are you referring to?

MR. WEIRES:

Objection, hearsay, Your Honor.

THE COURT:

What?

THE WITNESS:

The whole—

MR. WEIRES:

He only testified to one person being present, Mr. Quinones.

THE COURT:

Wait just a minute. By "they," are you referring to any one of the defendants?

THE WITNESS:

Yes, I do.

THE COURT:

Well, who is—

BY MR. YERKES:

Q. Who was there at the time?

A. Where, on the conversation?

Q. That's right, at the time of—

A. Just Mr. Quinones and myself.

Q. O.K. and you were talking about "they" felt that something was going—who is the "they" you were speaking of?

MR. WEIRES:

He can only—Your Honor, only statements that Mr. Quinones made.

MR. YERKES:

This is—

THE COURT:

We're trying to find out who the "they" are, Mr. Weires.

THE WITNESS:

They are Mr. Curbelo, Mr. Pino and the person who was involved in this Leesburg airport case.

BY MR. YERKES:

Q. What did they—what did he say they then—these "they" that you've identified, what did they feel?

MR. WEIRES:

Objection, Your Honor, it would be hearsay.

THE COURT:

Well, he's got two of the defendants identified. Who is the other person you're talking about?

MR. WEIRES:

Your Honor, he is the only one person and he is saying that somebody else told him what—

THE COURT:

Now, wait just a minute, Mr. Yerkes, there's no use looking disgusted. There's only one way to try this case and we try it under the rules and that's the way it's going to be done.

MR. WEIRES:

Now, what I'm saying, Your Honor, he's coming into double hearsay. He's saying what somebody said that somebody else said and that's what I'm objecting to.

MR. YERKES:

That's not correct, Your Honor.

THE COURT:

Well, he's allowed to testify as to any conversation that any of these defendants might have had with him or he had with them if he will specifically identify them and confine it to that conversation at a period of time somewhere near the period of time covered by the indictment and it's just that simple and if you will ask him questions along those lines, maybe he'll give answers that are responsive thereto and save some of these objections.

BY MR. YERKES:

Q. We're talking about this conversation that we've been speaking of—

A. Right.

Q. —for the last few minutes that you were having with Mr. Quinones, is that right?

A. Right.

Q. And he mentioned that he felt that—

THE COURT:

Don't—ask him what he said.

MR. YERKES:

All right.

THE COURT:

Don't you lead him.

THE WITNESS:

I said that they feel there was somebody inside the group who is being—I don't know how to explain, traitor, is a traitor or somebody who's being discovered then what are they been doing.

BY MR. YERKES:

Q. They discovered what they had been doing?

A. Yes. Somebody had been talking with the Government or some sort of agents and if they find who was the person, they will take a action against this person.

THE REPORTER:

Take a what?

THE WITNESS:

Take a action against this person.

BY MR. YERKES:

Q. Did he say what type of action?

A. Well—

MR. WEIRES:

Objection, Your Honor, leading again.

THE COURT:

No, I don't think so. Objection overruled.

THE WITNESS:

Yes, a personal action as to threaten life, you know, threaten to his life.

BY MR. YERKES:

Q. Did he say what kind of personal action?

A. Well, just probably shoot him to death or things like this.

THE COURT:

What was the last answer?

THE REPORTER:

He said: "Well, just probably shoot him to death or things like this."

THE COURT:

Go ahead, Mr. Yerkes.

BY MR. YERKES:

Q. Around this time that we're speaking of during the conspiracy between the early part of January—

MR. WEIRES:
Objection, Your Honor. (rr 25-33)

The prejudice to each defendant varies individually as to the proof of criminal acts other than those charged in the indictment. The defendants, Curbelo and Pino, share in common the deprivation of their Sixth Amendment right to cross-examine the witnesses against them by the improper admission into evidence of a hearsay declaration incriminating them both. This hearsay declaration was made by an alleged co-conspirator, Quinones, after the termination of the charged conspiracy.

That portion of the testimony relating to the alleged plot of Mr. Curbelo and Mr. Pino to assassinate an informer was after the arrest of all the defendants. It is hornbook law that, a conspiracy ends when one of the conspirators has been arrested. *Lutwak* v. *U. S.*, 344 U.S. 604, 618, 73 S.Ct. 481, 97 L.Ed. 593 (1953).

The United States Supreme Court in *Krulewitch* v. *U. S.*, 336 U.S. 440, 69 S.Ct. 481, 97 L.Ed. 593 (1949), was presented with a somewhat analogous factual situation. Petitioner therein was convicted for inducing a woman (the complaining witness) to cross state lines for purposes of prostitution and conspiring with another woman to commit these offenses. At his trial and over objection of his defense counsel, the following purported conversation between the complaining witness and petitioner's alleged co-conspirator some six weeks after the alleged transportation was testified to:

> She asked me, she says, "You didn't talk yet?" And I says "No". And she says, "Well don't" she says, "until we get you a lawyer." And then she says "Be very careful what you say." And I can't put it in exact words. But she said, "It would be better for

> us two girls to take the blame than Koy (the defendant) because he couldn't stand it, he couldn't stand to take it."

At page 442, the Court stated:

> "The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking."

The Supreme Court, in *Bruton* v. *U. S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1967), extended the rule excluding declarations of conspirators from being adduced against the named co-conspirators. In *Bruton*, there was a joint trial between Evans and Bruton for an armed post office robbery. At trial Evans did not testify, but his oral confession of Bruton to a postal inspector that he and Evans had committed the robbery was admitted solely against Evans. The trial Court immediately gave the jury a limiting instruction. The Supreme Court reversed, holding that since Evans did not testify, thereby adding substantial weight to the government's case-in-chief in a form not subject to cross-examination, thereby violating Bruton's Sixth Amendment right of cross-examination, and this encroach-

ment could not be avoided by a jury instruction to disregard the confession as to Bruton.

The analogy of *Bruton* to the instant case is obvious. The admission of Mr. Quinones is used against Mr. Pino and Mr. Curbelo, and there is not even a limiting instruction. The only difference is that in *Bruton* there was a knowing confession after the termination of the conspiracy. In the instant case, there was an alleged admission unknowingly made to a paid government informer. Like *Bruton*, Mr. Pino and Mr. Curbelo were deprived of their Sixth Amendment right to confrontation.

The impact of such testimony on a jury is obvious. As Quinones did not testify, Mr. Curbelo and Mr. Pino were deprived of their Sixth Amendment right of cross-examination.

The other attendant prejudice that occurred as a result of the admission of the discussed testimony is the elicitation of criminal act or plans of the defendant other than those charged in the indictment.

In *Michelson* v. *U. S.*, 335 U.S. 469, 473, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948), Mr. Justice Jackson speaking stated the rule applicable to the instant case as follows:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character. *Green* v. *U.S.*, 245 U.S. 559, 38 S.Ct. 209, 62 L. Ed. 469 but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law specific criminal acts, or ill name among his neighbors, even though

such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson* v. *United States*, supra.

The mandate of this Court against the introduction of such testimony has been consistently maintained. *Marshall* v. *U. S.*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Boyd* v. *U. S.*, 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077 (1891).

The opinion of the Court of Appeals admits the existing error stating at page 5974: "The trial judge's admission of the testimony seems to violate the federal hearsay rule." The Court of Appeals then becomes quite disingenuous in its treatment of the question. The error was dismissed by the court as follows:

(1) The error did not rise to constitutional standards as the error was merely admission of hearsay which did not deprive the defendants of the right of confrontation.

(2) Applying the standard of *Dutton* v. *Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) the court stated: "Moreover, though in violation of the hearsay rule the testimony implicating Pino and Curbelo in the threat was not crucial to the Government's case or devastating to the defendants."

(3) As the error does not rise to the level of constitutional error the "fair assurance" standard of *Katteakos v. U. S.*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) was applied by the Court of Appeals rather than the "harmless beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

A review of the factual situation of *Krulewitch* clearly established the constitutional magnitude of the error. The effect on the jury of a naked statement of a murder plot between the defendants can hardly be characterized as not being devastating to the cause of the defense. Ultimately, it is clear that the *Chapman* standard is ruling and applicable.

The Defendants were charged in Count One with conspiracy to import and distribute marijuana; in Count Two with knowingly and intentionally importing marijuana; and finally, in Count Three with knowingly and intentionally possessing with the intent to distribute marijuana, all of the above charges being in violation of Title 18, United States Code, Section 2, and Title 21, United States Code, Sections 841(a)(1), 952(a), 960(b) and 963.

Defendant, Octavio Pino, was found guilty as to each of Counts One, Two and Three; and the Defendant, Orlando Curbelo, was found guilty as to each of Counts One, Two and Three. The Court sentenced Defendant Octavio Pino-Villa to five years imprisonment as to each of Counts One and Two to run concurrently with a special parole term of two years as to each of Counts One and Two to run concurrently; and five years imprisonment as to Count Three with special parole term of two years to run consecutively to Counts One and Two for a total sentence of ten years imprisonment.

The Court sentenced Defendant Curbelo-Talvara to five years imprisonment as to each of Counts One, Two and Three, with special parole term of two years as to each of Counts One, Two and Three to run consecutively for a total sentence of fifteen years.

The reason that the sentence is important is that the evidence on Counts I and II can hardly be construed as rendering any error harmless beyond a reasonable doubt. Count I, the conspiracy, relies solely on the word of the informer Ortiz.

The facts, as discussed indicate that the entire physical effort of securing the marijuana and bringing it into the customs territory was accomplished by Ortiz, a paid government informer. None of the named defendants had any part in accomplishing the physical transportation of the contraband. It cannot be argued that the contraband was in the hands of any party other than the United States Government until it was in the customs territory of the United States.

The only theory on which a conviction could be sustained as to Count II is to argue that the defendants were aiders and abetters of Ortiz's crime. However, the law is well settled that both the Agent and the Informer must be treated as acting in concert, each with full knowledge of the actions of the other. *Sherman* v. *U. S.*, 356 U.S. 369, 373-375, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). As a sovereign cannot commit a crime against itself, then no crime was committed as regards Count II. The government must prove the principal had committed the crime before defendant could be convicted as an aider and abetter. *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262, 265, 83 S.Ct. 1130, 10 L.Ed.2d 335 (1963).

The consecutive sentences establish the prejudice which might have been rendered moot by concurrent sentences.

The Petitioners were deprived of their right of confrontation and were undeniably prejudiced thereby. Therefore, the conviction of the petitioners should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

Armando ARIAS-DIAZ, Delfin Hondares-Alfaro, Octavio Pino-Villa, Pedro Alvaro Zarzabal-Naranjo, Mario Orlando Curbelo-Talvara and Jose Quinones-Pita, Defendants-Appellants.

No. 73-2463.

United States Court of Appeals,
Fifth Circuit.

July 18, 1974.

Defendants were convicted in the United States District Court for the Middle District of Florida, at Ocala, Charles R. Scott, J., of marijuana offenses, and they appealed. The Court of Appeals, Wisdom, Circuit Judge, held that evidence was insufficient to sustain conviction of one defendant for possession of the marijuana; that activities of government informer did not amount to such outrageous conduct by the government as to deny defendants due process; that evidence of certain other criminal acts by certain defendants was admissible as tending to establish the conspiracy and the extent of their participation therein; and that hearsay statements made by alleged coconspirator after his arrest were not admissible against other alleged conspirators; but that error in admitting the same was harmless in light of the overwhelming evidence against the other alleged conspirators.

Affirmed in part; reversed in part.

1. Criminal Law (Key) 753.2(5)

Test to be applied by trial court in passing on motion for judgment of acquittal is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt. Fed.Rules Crim.Proc. rule 29(a), 18 U.S.C.A.

2. Drugs and Narcotics (Key) 123

Evidence was insufficient to sustain conviction for possession of marijuana in absence of substantial evidence that defendant was one of the several persons arrested while traveling in four cars containing a total of 1,947 pounds of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 1010(b), 1013, 21 U.S.C.A. §§ 841(a)(1), 952(a), 960(b), 963; 18 U.S.C.A. § 2.

3. Criminal Law (Key) 901

Codefendant's testimony did not constitute waiver by defendant of consideration of defendant's motion for acquittal made at the close of the Government's case. Fed. Rules Crim. Proc. rule 29(a), 18 U.S.C.A.

4. Criminal Law (Key) 901

A defendant who testifies himself and supplies deficiencies in the Government's case waives appellate review of denial of his motion for judgment of acquittal at the close of the Government's case. Fed.Rules Crim.Proc. rule 29(a), 18 U.S.C.A.

5. Criminal Law (Key) 1186.1

To require reversal, Government's conduct in connection with criminal enterprise, not constituting entrapment in that the Government's deception did not actually implant the criminal design in the mind of the defendant, must violate that fundamental fairness, shocking to the universal sense of justice, mandated by the due process clause of the Fifth Amendment. U.S.C.A.Const. Amend. 5.

6. Constitutional Law (Key) 257

Government's role in marijuana importation scheme was not so outrageous as to deprive defendants of due process where all that was involved was the presence of a government informer in the scheme, who furnished the ability to fly an airplane, and who carried messages among the participants thereby facilitating the meeting of criminal minds.

7. Criminal Law (Key) 369.2(1)

Though the prosecution cannot use evidence of other crimes to show the defendant's propensity to commit the crime charged, it can use it for another relevant purpose.

8. Criminal Law (Key) 369.2(3)

In prosecution for a marijuana importation conspiracy, testimony implicating two defendants in an earlier scheme to import marijuana as well as testimony that certain defendants threatened to kill whoever informed on them was admissible as tending to establish the conspiracy charged and to show the extent of particular defendants' involvement.

9. Criminal Law (Key) 422(1), 1169.7

Where declarant's role as a coconspirator had ended by reason of his arrest, his later declaration to effect that other defendants had threatened to kill informer should not have been admitted against those other defendants, but the error in admission of such testimony was harmless in light of the overwhelming evidence against those other defendants. Fed. Rules of Evidence, rule 801 (d)(2)(E), 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C.A.

10. Criminal Law (Key) 423(1)

To be admitted under coconspirator exception to hearsay rule, statements must be made in furtherance of the "main aim" of the conspiracy; statements made in efforts to prevent detection and punishment are inadmissible. Fed.Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

11. Criminal Law (Key) 422(9)

Hearsay statements made by an alleged coconspirator after his arrest are generally inadmissible against all but the declarant. Fed.Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

12. Criminal Law (Key) 662(1)

Testimony may violate hearsay rule without violating confrontation clause of the Constitution. U.S.C.A.Const. Amend. 6.

13. Criminal Law (Key) 1162

With respect to nonconstitutional error, verdict and judgment should stand if court is sure that error did not influence jury, or had but very slight effect.

14. Criminal Law (Key) 1169.1(9)

Hearsay testimony that is neither "crucial" nor "devastating" for purposes of determining whether there has been violation of the confrontation clause may nevertheless amount to reversible error under standard applicable to nonconstitutional error. U.S.C.A.Const. Amend. 6.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM and GOLDBERG, Circuit Judges, and LYNNE, District Judge.

WISDOM, Circuit Judge:

About 5 a. m., January 10, 1973, United States customs agents stopped four cars traveling together near the Leesburg Airport, Florida. The agents arrested six persons caught redhanded with a total of 1947 pounds of marijuana. The defendants-appellants, Arias, Hondares, Pino, Zarzabal, Curbelo, and Quinones,[1] were indicted, each on three charges of violating the marijuana laws: conspiring to import and distribute marijuana; knowingly and intentionally importing marijuana; and knowingly and intentionally possessing marijuana with the intent to distribute it. See 21 U.S.C. §§ 841(a)(1), 952(a), 960(b), 963 and 18 U.S.C. § 2. The defendants were tried together. Pino and Curbelo were convicted on all three counts. The other defendants were convicted only of possession of the marijuana. All appeal. We reverse the conviction of Zarzabal and affirm the convictions of the other five.

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1. We refer to the defendants-appellants by shortened names, as they are referred to in the record and briefs.

I.

Juan Ortiz, an airplane pilot, was a government informer and the chief government witness. He testified that on December 7, 1972, he met with an alleged narcotics smuggler from Colombia, Raul Gonzales, at a hotel in Miami, Florida. Ortiz had met Gonzales through Curbelo. In the hotel lobby Ortiz was introduced to Nacre Dace, another alleged marijuana dealer from Colombia. Dace later asked Ortiz to introduce him to Curbelo. Ortiz informed Curbelo that "there was a person from Colombia who wanted to see him". Curbelo suggested that they meet in his trailer. The meeting took place at 11 a. m. the next morning; Curbelo, Ortiz, Dace, and Pino were present. Dace said that a friend of Curbelo's needed money and had about 1800 pounds of marijuana in Colombia for sale. Curbelo agreed to pay Ortiz $55,000 to fly to Colombia to pick up the marijuana and bring it back into the United States. Curbelo was to send $36,000 with Ortiz as partial payment for the shipment and later pay another $36,000 to complete the deal.

Curbelo gave Ortiz several hundred dollars to make a deposit on the rental of an airplane, and later Curbelo and Pino brought Ortiz $2,500 to cover rental of the plane and other expenses. They told Ortiz how to make the connection in Colombia. Arrangements were also made for Ortiz to be met at Leesburg, Florida, upon his return from Colombia. Ortiz was to pick up a car parked near the landing field at Leesburg and drive it to the local Holiday Inn. He would be met there by Pino and Curbelo. Ortiz divulged the plan to United States customs agents.

Ortiz flew from Miami to Colombia, as planned, and picked up 24 boxes of marijuana, disguised as cartons of cigarettes. He then flew to Kingston, Jamaica. After

speaking with a customs agent, he flew on to Marathon, Florida, where he refueled and flew on to Leesburg. When he landed at Leesburg, he was unable to find the appointed car, and he was unable to locate Pino or Curbelo at the Holiday Inn. He then taxied to a remote area of the airport, dumped the 24 boxes of marijuana on the ground, and flew to Miami. At that time his plane was fully inspected by U. S. Customs agents and found not to contain any type of drugs. When he arrived at his home in Miami at about 3 a. m., January 10, he learned from his wife that Pino had called. Pino called again between 3:30 and 4 a. m. He said that he was at the Leesburg Airport and asked where the marijuana was. Ortiz told him that it was at the end of the east-west runway.

Fifteen customs agents were at the Leesburg Airport in the early morning hours of January 10, 1973. At about 4:30 a. m. four cars pulled up and parked near the east-west runway. Half an hour later three of those cars proceeded to the area where Ortiz had left the cartons of marijuana. When the cars departed shortly thereafter, the cartons were gone. As these automobiles left the airport, they were joined by a fourth. Customs agents, who had been staked out at the airport, stopped all four cars. Curbelo, the driver of the fourth car, had none of the cartons; he did have two .38 caliber snub-nosed revolvers in the trunk of his car. Pino, with a passenger unidentified at trial, was driving a car containing nine cartons. Hondares, with Quinones as a passenger, had eight. The remaining car contained seven cartons. The driver was not identified at trial. Customs agents did not show that Zarzabal or Arias was in any of the vehicles stopped; nor did the agents identify them as being at the airport.

II.

At the close of the Government's case, all of the defendants moved for judgments of acquittal on all counts. The motions were denied. Zarzabal now argues that the court erred in denying his motion.

[1] The test to be applied by the trial court in passing on a motion for judgment of acquittal "is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Jeffords, 5 Cir. 1974, 491 F.2d 90, 91; United States v. Knox, 5 Cir. 1972, 458 F.2d 612, 615, cert. denied, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 85; Jones v. United States, 5 Cir. 1968, 391 F.2d 273, 274. The judge is to direct acquittal "if the evidence is insufficient to sustain a conviction". Fed.R.Crim.Proc. 29(a).

[2] The court erred in denying Zarzabal's motion to dismiss and in submitting the case against him to the jury. There was no evidence in the Government's case-in-chief to implicate Zarzabal directly. One of the customs agents, Mason, identified Pino as the driver of one of the cars and stated that there was a passenger, but he could not remember the passenger's name. The Government asks us to infer from this bald statement that the passenger was Zarzabal. We cannot draw this inference. Nor are we inclined to follow the Government's suggestion that testimony establishing that six suspects were arrested and that "all the defendants" were taken into Leesburg Municipal Courtroom and advised of their rights was sufficient to support a reasonable jury finding of Zarzabal's guilt beyond a reasonable doubt. This is not "substantial evidence" to support the verdict. See United States v. Jackson, 5 Cir. 1971, 444 F.2d 1389.

[3, 4] The Government also argues that Zargabal waived appellate consideration of the denial of his motion for acquittal when his codefendant, Arias, testified and supplied deficiencies in the Government's case. Arias took the stand and attempted to raise a defense that he had no knowledge that the packages contained marijuana. During his testimony he mentioned that about 1 a. m. on January 10, 1973, he rented a room at the Holiday Inn in Leesburg, Florida, for Zarzabal and himself. It is problematical whether this testimony added enough to the nascent case against Zarzabal to permit it to go to the jury.[2] In any event, we cannot accept Arias's testimony as representing Zarzabal's waiver of consideration of the motion for acquittal. The rule is well-recognized in this circuit that a defendant who testifies *himself* and supplies deficiencies in the Government's case waives appellate review of a denial of his motion for judgment of acquittal at the close of the Government's case.[3] See United States v. Jackson, *supra*, 444 F.2d at 1389; United States v. Rawls, 5 Cir. 1970, 421 F.2d 1285. We adhere to it. But that doctrine should not be extended to imply waiver when a codefendant testifies. See Cephus v. United States, 1963, 117 U.S.App. D.C. 15, 324 F.2d 893, 897.

III.

[5, 6] The appellants argue that through the activities of Ortiz, the informer, the Government's role was so integral a part of the criminal enterprise as to be repugnant to the criminal justice system and deprive the appellants of due process. They are careful not to couch this argument

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2. Zarzabal renewed his motion for acquittal at the close of all the evidence. See Fed.R.Crim.P. 29(2).

3. Presumably for this reason, Arias, against whom the evidence produced in the Government's case-in-chief was weak, has not appealed the denial of his motion for acquittal.

as entrapment. The theory, once increasingly relied on by defendants, that entrapment exists as a matter of law when there is "an intolerable degree of governmental participation in the criminal enterprise" was cut short by the 1973 Supreme Court decision United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366. In *Russell* the Court reaffirmed the classic predisposition test for entrapment: "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." 411 U.S. at 436. The Court did not rule out the possibility, however, that it might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-432. The appellants here contend that that day has now arrived, ushered in by the case at bar.

We need not lay out a detailed account of Ortiz's role to dispose of the appellants' argument on this point. Their attempt to impart life to the theory, discredited in *Russell*, that government involvement in criminal activity bars prosecution must fail. It is clear that the situation envisioned by the Supreme Court in *Russell* to require reversal involved more than the presence of a government informer in the scheme and his supplying a not uncommon, though essential, skill, such as here the ability to fly a plane.[4] And we think that the "out-

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4. The Government's supplying pilot's skills is similar to the Government's supplying in *Russell* a scarce, though legal, chemical used in the manufacture of methamphetamine ("speed"). It is very different from the Government's providing the contraband, "the possession or distribution of which constitutes the very substance of the crime". United States v. Oquendo, 5 Cir. 1974, 490 F.2d 161, 163; see United States v. Bueno, 5 Cir. 1971, 447 F.2d 903.

rageous" conduct postulated by the Court must be more than carrying messages and thereby facilitating the meeting of criminal minds. These mark the extent of Ortiz's contribution. To require reversal, the Government's conduct must violate that "'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment". *Id.* at 432, quoting Kinsella v. United States ex rel. Singleton, 1960, 361 U.S. 234, 246, 80 S.Ct. 297, 4 L.Ed.2d 268. Where that threshold may lie, we are not required to say in this case. But the Government has certainly not crossed it here.

IV.

Quinones, Pino, and Curbelo argue that the trial court erred in permitting, over strenuous objection, certain evidence of other criminal acts of the defendants to be admitted. The evidence complained of related to two different transgressions. First, Ortiz implicated Pino and Curbelo in an earlier scheme to import marijuana.[5] Second, Ortiz testified that weeks after the arrests were made near the Leesburg Airport, Pino and Quinones separately communicated to him that someone must have informed the Government as to the time the marijuana would be arriving in Leesburg. Each stated that when he discovered who the informer was, he would kill him. Ortiz related that Quinones had implied that the threats came from Pino and Curbelo, but that Quinones felt the same way.

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5. The district court instructed the jury that the testimony with regard to this earlier importation of marijuana applied only to Pino and Curbelo.

Ortiz also mentioned that he and Quinones had "conversations leading on a flight to Colombia to brought a load of drugs from Colombia". After objection the court instructed the jury that the comment would be stricken from its consideration.

[7, 8] The general rule, well-settled, is that evidence of offenses not charged in the indictment is not admissible. Weiss v. United States, 5 Cir. 1941, 122 F.2d 675, 682, cert. denied, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550. There are, however, exceptions, also well-settled. See Ehrlich v. United States, 5 Cir. 1956, 238 F.2d 481, 484. Taken together, the rule and the exceptions teach that although the prosecution cannot use evidence of other crimes to show the defendant's propensity to commit the crime charged, it can use it for another relevant purpose. United States v. Abshire, 5 Cir. 1972, 471 F.2d 116, 118. Here the testimony helped to prove that the defendants were part of a conspiracy to import marijuana illegally. For this purpose it was properly admissible. See United States v. Gonzalez, 5 Cir. 1974, 491 F.2d 1202, 1205; United States v. Nakaladski, 5 Cir. 1973, 481 F.2d 289, 296. The challenged testimony illuminated the character of the conspiracy and the extent of the involvement of the participants. Specifically, the testimony relating to the earlier marijuana load cast light on the duration of Pino's and Curbelo's association and the objects of their joint activities. See Devoe v. United States, 8 Cir. 1939, 103 F.2d 584, 589, cert. denied, 308 U.S. 571, 60 S.Ct. 84, 84 L.Ed. 479. The threats tended to reaffirm the extent of Pino's involvement, in addition to showing Quinones's role.

This is not a case where the evidence was introduced to prove an element not *"a critical ingredient of the offense charged"*. United States v. Goodwin, 5 Cir. 1974, 492 F.2d 1141, 1151, quoting Hamilton v. United States, 5 Cir. 1969, 409 F.2d 928, 930 (emphasis in original). Proof of the existence of the conspiracy, of course, is an essential first step in proving the crime of conspiracy. The existence and membership of the conspiracy were definitely at issue here. Compare *Goodwin*. We hold that it was within

the trial court's discretion to admit the challenged evidence as tending to establish the conspiracy charged. See United States v. Fonseca, 5 Cir. 1974, 490 F.2d 464, 469; United States v. Abshire, *supra*, 471 F.2d at 118; Devoe v. United States, *supra*, 103 F.2d at 588-589.

V.

[9] Pino and Curbelo further argue that they were denied their sixth amendment right of confrontation when the trial court permitted, over objection, the introduction of hearsay testimony implicating them in the threat made by Quinones to Ortiz. The district judge admitted the testimony on the theory that it satisfied the federal co-conspirator exception to the hearsay rule. Although we agree with the appellants that the district court erred in admitting the testimony, we do not find the error so prejudicial as to require reversal.

[10, 11] The federal co-conspirator exception permits the introduction of hearsay statements "by a co-conspirator of a party during the course and in furtherance of the conspiracy". Federal Rules of Evidence, Rule 801 (d)(2)(E) (1972); 3 Wharton's Criminal Evidence, § 642 (13 ed. 1973). To be admitted under the exception, the statements must be made in furtherance of the "main aim" of the conspiracy; statements made in efforts to prevent detection and punishment are inadmissible. Krulewitch v. United States, 1949, 336 U.S. 440, 444, 69 S.Ct. 716, 93 L.Ed. 790. Furthermore, hearsay statements made by an alleged co-conspirator after his arrest are generally inadmissible against all but the declarant. Lutwak v. United States, 1953, 344 U.S. 604, 618, 73 S.Ct. 481, 97 L.Ed. 593; Hamilton v. United States, 1970, 139 U.S.App. D.C. 368, 433 F.2d 526, 530, cert. denied, 402 U.S. 944, 91 S.Ct. 1612, 29 L.Ed.2d 112. For a person's role in

a conspiracy ends with his arrest. See United States v. Harrell, 5 Cir. 1970, 436 F.2d 606, 613, cert. denied, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86.

Quinones was arrested in Leesburg on January 10, 1972. His threat to Ortiz, and implication of Pino and Curbelo, occurred about five weeks later. Because Quinones's role as a co-conspirator in the marijuana smuggling ended with his arrest, his declarations made later should not have been admitted against Pino and Curbelo. The trial judge's admission of the testimony seems to violate the federal hearsay rule.[6]

[12] We hold, however, that the error does not rise to constitutional proportions. See United States v. Fischetti, 5 Cir. 1971, 450 F.2d 34, 41, cert. denied, 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478. In California v. Green, 1970, 399 U.S. 149, 155-156, 90 S.Ct. 1930, 26 L.Ed.2d 489, and Dutton v. Evans, 1970, 400 U.S. 74, 81-82, 91 S.Ct. 210, 27 L.Ed.2d 213, the Supreme Court observed that the hearsay rule and the confrontation clause of the sixth amendment are not congruent. Testimony may violate the hearsay rule without violating the Constitution. Here, because the declarant Quinones was a defendant, he was not available to be called by the prosecution. See United States v. Burke, 5 Cir. 1974, 495 F.2d 1226. Moreover, though in violation of the hearsay rule, the testimony implicating Pino and Curbelo in the threat was not crucial to the Government's case or devastating to the defendants.

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6. In response to a defense objection to the hearsay nature of Ortiz's testimony, the trial judge said:

> Well, he's allowed to testify as to any conversation that any of these defendants might have had with him or he had with them if he will specifically identify them and confine it to that conversation at a period of time somewhere near the period of time covered by the indictment. . . .

This is not the rule.

See Dutton v. Evans, *supra*, 400 U.S. at 87; United States v. Burke, 495 F.2d 1226. The other evidence against Pino and Curbelo was solid and virtually compelled a jury finding of guilt beyond a reasonable doubt on all counts. Pino and Curbelo were present at the first meeting, at which plans for the January marijuana caper were laid. There Curbelo agreed to buy the Colombian marijuana and to arrange for it to be flown to the United States. Together Pino and Curbelo brought Ortiz $2,500 to rent the airplane to be used to import the marijuana. Pino telephoned Ortiz upon the latter's return from Colombia, inquiring where the marijuana might be found. And both were arrested in close proximity to almost a ton of marijuana on January 10, 1973. Finally, Pino made an independent threat to Ortiz. At most, the questioned testimony was "peripheral". See Dutton v. Evans, *supra*, 400 U.S. at 87.

[13] Because we find no constitutional error, we use the traditional standard to determine whether the error was harmless. Compare Chapman v. California, 1967, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (constitutional error) with Kotteakos v. United States, 1946, 328 U.S. 750, 764-765, 66 S.Ct. 1239, 90 L.Ed. 1557 (nonconstitutional error). The standard applicable to nonconstitutional error was stated in *Kotteakos*:

> If, when all is said and done, the conviction [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be

> merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-765. See Fed.R.Crim.P. 52(a).

[14] The standard for determining the harmlessness of error under *Kotteakos* is more strict than that for determining whether the admission of hearsay testimony violates the confrontation clause under *Dutton*. In other words, hearsay testimony that is neither "crucial" nor "devastating" under *Dutton* may nevertheless amount to reversible error under *Kotteakos*. In the case before the Court, however, the evidence against Pino and Curbelo was overwhelming. We conclude that the hearsay testimony, even if improperly admitted, had no substantial effect on the verdict.

VI.

The appellants raise six other contentions. They maintain that (1) the evidence was insufficient to convict Pino and Curbelo of unlawfully importing marijuana; (2) the Government failed to correct perjurous statements of Ortiz, the chief government witness; (3) the Government violated a pretrial discovery order by not disclosing to the appellants an oral exculpatory statement made by Curbelo at the time of his arrest; (4) the Government failed to tender reports of the Government's expert witnesses to the appellants; (5) the district court erred by admitting evidence of post-indictment conversations between Ortiz and appellants Pino and Quinones; and (6) the trial court abused its discretion in denying Curbelo's motion for severance. We have carefully considered these contentions, and we find them to be without merit.

Affirmed in part, reversed in part.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2463

D. C. Docket No. CR 73-1-Cr-Oc

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARMANDO ARIAS-DIAZ, DELFIN HORDARES-ALFARO, OCTAVIO PINO-VILLA, PEDRO ALVARO ZARZABAL-NARANJO, MARIO ORLANDO CURBELO-TALVARA, and JOSE QUINONES-PITA,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before WISDOM and GOLDBERG, Circuit Judges, and LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part.

July 18, 1974

Issued as Mandate: December 2, 1974
As to Pino-Villa ONLY
Re-Issued as Mandate: December 2, 1974
As To Arias-Diaz and Hordares-Alfaro ONLY

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

November 22, 1974

TO ALL COUNSEL OF RECORD

Re: U.S.A. V. ARIAS-DIAZ, ET AL
73-2463

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk

By /s/ Anne G. Parent
Deputy Clerk

cc: Mr. George B. Weires
Mr. Tyce S. Smith
Mr. Robert S. Yerkes

*As to Arias-Diaz; Hordares-Alfaro; Pino-Villa; Curbelo-Talvara and Quinones-Pita

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-795

MARIO CURBELO-TALVARA AND
OCTAVIO PINO-VILLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners allege that the court of appeals erred in concluding that the admission of certain hearsay statements at trial constituted harmless error. In addition, petitioner Pino argues that his right to counsel was violated when a statement that he made to an informant after his indictment was introduced at trial.

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on three counts charging conspiracy, importation of marijuana, and possession of marijuana with intent to distribute (21 U.S.C. 841(a)(1), 952(a) and 960(b); 18 U.S.C. 371). Petitioner Curbelo was sentenced to consecutive

five-year prison terms on each count and given a special parole term of two years. Petitioner Pino was sentenced to concurrent five-year prison terms on two counts and given a special parole term of two years; in addition, he was given a consecutive sentence of five years' imprisonment and a special parole term of two years on count three. The court of appeals affirmed (Pet. App. A).[1]

The evidence is outlined in the opinion of the court of appeals. Briefly, petitioner Curbelo introduced Juan Ortiz, then a government informant, to Raul Gonzales, an alleged narcotics smuggler from Colombia. Gonzales in turn introduced Ortiz to Nacre Dace. Subsequently, pursuant to a plan between Dace and petitioner Curbelo to smuggle some marijuana from Colombia, Curbelo agreed to pay Ortiz, a pilot, to fly to Colombia and pick up the contraband (rr. 133-137).[2] Curbelo, accompanied by Pino, later gave Ortiz the money with which to rent a plane for this purpose. Ortiz was instructed to fly the contraband to the Leesburg, Florida, airport, where he was to be met by petitioners Curbelo and Pino (rr. 6-7).

Ortiz made the flight as planned, but upon landing at the Leesburg airport he found no one there to take possession of the marijuana he carried and he was not able to locate either of the petitioners. Consequently, he deposited the marijuana, which weighed almost a ton and was packed in twenty-four cigarette cartons, along one of the airport runways and then

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[1]Four other defendants, Armando Arias-Diaz, Delfin Hondares-Alfaro, Pedro Alvaro Zarzabal-Naranjo and Jose Quinones-Pita, were also convicted of possession of marijuana. The court of appeals reversed Zarzabal's conviction for insufficiency of the evidence and affirmed as to the other three.

[2]The transcript references used here correspond to those used in the petition, p. 3.

continued to Miami. At three o'clock the following morning, Ortiz received a telephone call from petitioner Pino. Pino inquired about the location of the marijuana, which Ortiz disclosed to him (rr. 14-15).

Between thirty minutes to one hour after petitioner Pino called Ortiz, customs agents spotted four cars pull up and park near the east-west runway of the Leesburg airport. Shortly thereafter, three of the cars proceeded to the runway where Ortiz had dropped the marijuana and the occupants retrieved the cartons (Tr. 322-327). All four of the cars then left the airport and headed toward Leesburg (Tr. 399). Customs agents stopped the cars before they reached Leesburg and arrested the occupants. The agents found cartons of marijuana in all the cars except petitioner Curbelo's. Petitioner Pino was driving a car containing nine cartons of marijuana (Pet. App. A7).

1. Ortiz testified at trial that after the arrests and indictment, defendant Quinones spoke with him and disclosed that petitioners suspected someone had informed and that they intended to kill that individual on discovering his identity. Petitioners argue that Quinones' statement constituted inadmissible hearsay and that the court of appeals, recognizing the inadmissibility of the statements, applied the wrong test in concluding that the error was harmless. The court of appeals, not considering the error to be of constitutional magnitude, applied the "substantial influence" test of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765, rather than the "beyond a reasonable doubt" standard specified in *Chapman* v. *California*, 386 U.S. 18, 24, for constitutional error.

We agree that Quinones' statements were not admissible under the federal hearsay rule. A hearsay statement by a co-conspirator made in furtherance of a conspiracy is of course generally admissible against other conspirators, but after the object of a conspiracy has been attained or defeated, as in the instant case, the utterance is not admissible under the federal hearsay rule. See *Anderson* v. *United States*, 417 U.S. 211; *Lutwak* v. *United States*, 344 U.S. 604; *Krulewitch* v. *United States*, 336 U.S. 440. Contrary to petitioners' assertion, however, this rule has not been generated by constitutional mandate but solely by considerations of sound jurisprudence implemented pursuant to this Court's rule-making powers. See *Dutton* v. *Evans*, 400 U.S. 74, 81-82.

In *Dutton* v. *Evans*, *supra*, the Court declined to hold unconstitutional a state evidentiary rule permitting the admission of a co-conspirator's hearsay statement made as part of an effort to conceal the conspiracy. Thus, it is clear that the trial court's departure from the federal hearsay rule in the present case was not an error of constitutional magnitude and that the court of appeals was correct in not applying the more stringent "beyond a reasonable doubt" test in concluding that the error was harmless. In any event, however, we submit that the evidence against petitioners—particularly their being apprehended with almost a ton of marijuana after having been observed retrieving it from the Leesburg airport—was sufficient to warrant the conclusion that the admission of Quinones' statement did not affect the jury's verdict even if the more rigorous test of harmless error is applied.

2. Petitioner Pino also argues that a statement which he made to Ortiz after the arrests and indictment, about which Ortiz also testified at trial (Pet. 7-12), was admitted in violation of his Sixth Amendment right to the assistance of counsel as defined in *Massiah* v. *United States*, 377 U.S. 201. In *Massiah*, after the defendant had been indicted and had obtained counsel, an informant—at the government's request and direction—deliberately elicited inculpatory statements from the defendant. These statements were transmitted to government agents by means of a radio device concealed under the front seat of the informant's car. This practice was deemed a denial of the defendant's right to counsel. In the instant case, by contrast, there is no indication in the record, and petitioner Pino does not allege, that Ortiz had deliberately sought him out or elicited the damaging statements from him. Consequently, there was no overreaching by the government and reliance by petitioner Pino on the Court's decision in *Massiah* is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

DOJ-1975-02